STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2012
v	No. 299806 Wayne Circuit Court
JOHN KIMBROUGH, Defendant-Appellant.	LC No. 10-001866-FH

Before: M. J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of delivery of less than five kilograms of marijuana, MCL 333.7401(2)(d)(*iii*), and the trial court sentenced him to two years' probation. Defendant appeals as of right. We affirm.

On November 26, 2009, Detroit police officer Keith McCloud and a narcotics crew executed a narcotics search warrant at a home located at 16564 Pinehurst in Detroit. Before executing the search warrant, the officers were finishing up the execution of another search warrant a few houses down the street. While McCloud was standing at the other location, he was conducting a "pre-surveillance" of the 16564 Pinehurst location. He observed defendant park his car on the street and exit his vehicle carrying a white plastic grocery bag with yellow and red writing on it. Defendant carried the bag into the home located at 16564 Pinehurst and stayed inside the home for approximately five minutes. Defendant then exited the home carrying what appeared to be a large amount of money. He got into his vehicle and drove away.

McCloud had a suspicion that the bag defendant was carrying had drugs in it as he had seen defendant on many previous occasions go inside the location with this grocery bag and then come out with money. McCloud pursued and initiated a traffic stop of defendant's vehicle. McCloud smelled a strong odor of marijuana emitting from defendant's vehicle. McCloud patted defendant down for weapons but, instead, found $1,875 on defendant. McCloud seized the money on the belief that it was drug proceeds.

Charles Townsend, Natalie Taylor, and a baby were inside the home at 16564 Pinehurst during the execution of the search warrant. Townsend was observed coming from a room containing a baby crib. McCloud confiscated from inside the crib a grocery bag resembling the bag that defendant had carried into the home. The bag contained two freezer bags containing marijuana. No other bags resembling the bag defendant carried into the home were found.

Townsend, who was also arrested, testified that he installed some windows for defendant and that defendant was present at his house to give him $200 for the installation on the day of the raid. Townsend testified that defendant never got out of his vehicle and that he did not give Townsend a white bag. Townsend also testified that he packaged and put the marijuana in the crib. Townsend admitted that he told the police at the time of search that defendant had just brought him two Ziploc bags of marijuana. He also signed a written statement for police that defendant brought "two zips," or two ounces of marijuana. He explained at trial that he did not mean to tell the police this or to bring defendant into the situation, but that he believed that he would lose his daughter if he did not tell the police "something."

Defendant first argues that he was denied the effective assistance of counsel at trial. A claim of ineffective assistance of counsel must be raised by a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). At the sentencing hearing defendant expressed to the trial court that he was unsatisfied with the performance of defense counsel and identified the specific instances in which he thought defense counsel's performance denied him the opportunity to submit a full defense. The trial court found that there was no evidence on the record that defendant was denied the opportunity to submit a full defense and, therefore, denied defendant's motion for a new trial.

In the absence of an evidentiary hearing, this Court reviews a defendant's claim of ineffective assistance of counsel based on the existing record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). The determination whether a defendant has been deprived the effective assistance of counsel is subject to de novo review. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and this performance prejudiced him. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). To demonstrate prejudice, the defendant must show the probability that but for counsel's errors, the result of the proceedings would have differed. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004). Counsel is presumed to be effective and engaged in trial strategy, and the defendant has the heavy burden to prove otherwise. *LeBlanc*, 465 Mich at 578; *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Decisions regarding whether to call and question witnesses and what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Furthermore, this Court refuses to substitute its judgment for that of counsel regarding trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "In addition, trial counsel is not ineffective when failing to make objections that are lacking in merit." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant did not properly preserve for review by this Court his claims of ineffective assistance of counsel based on defense counsel's alleged failure to investigate the crime scene, prepare for trial, and reasonably communicate with him. Furthermore, the record is silent regarding these claims. Therefore, defendant has effectively waived these aspects of his ineffective assistance of counsel claim for review by this Court.

Defendant also argues that defense counsel was ineffective because he failed to preserve and produce a white grocery bag with red and yellow writing on it for fingerprint testing. This Court will not discuss an issue which a party has failed to present authority for; failure to support an issue constitutes abandonment. *People v Gallagher*, 68 Mich App 63, 66 n 1; 241 NW2d 759 (1976). Defendant did not present legal authority in support of this aspect of his ineffective assistance of counsel claim in his brief on appeal. Therefore, defendant has abandoned this aspect of claim. *Gallagher*, 68 Mich App at 66 n 1.

However, even if the issue were not abandoned, a Detroit police officer testified that he put the grocery bag into evidence, but the bag was lost. Thus, defense counsel would not have been able to produce the white grocery bag for fingerprint testing. Nevertheless, defendant and Townsend testified that defendant did not give Townsend a white grocery bag containing marijuana. Thus, defendant was able to present the defense that he did not deliver a white grocery bag containing marijuana to Townsend. Therefore, counsel's failure to preserve and produce the white grocery bag for fingerprint testing did not deny defendant a substantial defense because it did not deny defendant a defense at all. See *Dixon*, 263 Mich App at 398. Therefore, this aspect of defendant's ineffective assistance of counsel claim, even if not abandoned, is without merit.

Defendant next argues that defense counsel's failure to call his tenants to support his testimony that the money on his person was rent money that he collected from his tenants rather than drug proceeds, and defense counsel's failure to present defendant's receipt for the $200 he paid Townsend for installing windows, denied defendant the effective assistance of counsel. Defense counsel's decisions not to call and question defendant's tenants and not to present defendant's receipt for $200 paid to Townsend for installing windows are presumed to be matters of trial strategy and defendant has failed to prove that defense counsel was not engaged in trial strategy. *Rockey*, 237 Mich App at 76-77. Furthermore, defendant testified that the money he had on his person was proceeds from his rental properties, which he had collected from his tenants earlier in the day on November 26, 2009. Also, defendant and Townsend testified that on November 26, 2009, defendant went over to Townsend's home and paid Townsend $200 for the installation of windows by Townsend on defendant's rental properties. However, Townsend testified that he told the police that defendant had just delivered to him two ounces, or two Ziploc bags, of marijuana. Townsend also signed a written statement confirming these facts. Also, McCloud testified that he saw defendant get out of a vehicle carrying a white plastic grocery bag with yellow and red writing on it. McCloud saw defendant carry the bag into the home located at 16564 Pinehurst, and according to McCloud, defendant stayed inside the home approximately five minutes. McCloud then saw defendant exit the home carrying what appeared to be a large amount of money. Therefore, even if it is assumed that counsel erred, defendant has failed to show that, but for counsel errors, the result of the proceedings would have been different given the evidence against defendant. *Solmonson*, 261 Mich App at 663-664.

Lastly, defendant argues that defense counsel was ineffective for failing to object to the prosecution's alleged misconduct. As discussed *infra*, the prosecutor did not engage in misconduct and, therefore, defense counsel was not ineffective by failing to object to the prosecution's conduct. *Matuszak*, 263 Mich App at 58.

Defendant alternatively requested a remand for a *Ginther* hearing in his brief on appeal. Under, MCR 7.211(C)(1)(a)(ii), a defendant may move to remand a case when development of a factual record is required for appellate consideration of an issue, if the motion is filed within the time for filing a brief on appeal. However, "[a] motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at a hearing." MCR 7.211(C)(1)(a)(ii). Defendant's statements and other documentation attached to his brief on appeal regarding his ineffective assistance of counsel claims are not affidavits and are not offers of proof that demonstrate the existence of facts that create an issue requiring a remand under MCR 7.211(C)(a)(ii) because, as described above, given the evidence presented by defendant and the prosecution, defendant has failed to show that, even if defense counsel erred, the outcome of the proceedings would have been different. See *Solmonson*, 261 Mich App at 663-664; *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). Therefore, defendant has failed to show the existence of facts that demonstrate defendant was denied the effective assistance of counsel, and thus, the need for an evidentiary hearing.

Next, defendant argues that the prosecution committed several instances of misconduct. In order to properly preserve a claim of prosecutorial misconduct for review by this Court, the defendant must object to the prosecutor's conduct. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). This Court's review of prosecutorial misconduct is generally precluded absent the defendant's objection, because the trial court is otherwise deprived of a chance to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant did not object to the prosecution's arguments that the police witnesses were credible, that Townsend was not credible, and that defendant's vehicle smelled like marijuana. Therefore, these issues have not been properly preserved for review.

This Court reviews unpreserved claims of prosecutorial misconduct for plain error that affected the defendant's substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Leshaj*, 249 Mich App at 419.

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case. *Id*. at 66. The prosecution may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). However, the prosecution may make arguments from the facts and testimony that the witnesses at issue were credible or should be believed. *Dobek*, 274 Mich App at 66; *McGhee*, 268 Mich App at 630.

Defendant argues that, during its closing argument, the prosecution improperly vouched for and bolstered the credibility of the police witnesses. Defendant also argues that the prosecution improperly argued that Townsend was not credible, and lastly, the prosecution

misstated the evidence by stating that there was evidence that defendant's vehicle smelled like marijuana.

During its closing argument the prosecution made the following arguments:

> I believe the officers' testimony, all the officers; Officer McCloud, Sergeant [Cory] Karssen and Officer [Lamar] Penn are credible and it makes sense as to what happened that day.
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> * * *
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> And when you've got officers with years of experience and they see the same thing over and over again in drug deals, drug buys, drug houses and how it works, how the deliveries work, how the sales work, how the buys work. When they see something that they've seen numerous times at a house suspected to be a drug house that they are about to raid and the conduct of the Defendant is something they have seen numerous times by drug dealers, you betcha [sic] they're pulling them over to investigate them.
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> * * *
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> The officers were very credible. They were very credible about what happened. And they're very believable that he pulled up to that house and didn't see the van.
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> * * *
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> I don't think Mr. Townsend is credible. And nothing that he said made sense whatsoever.

Here, McCloud testified that he saw defendant deliver a white grocery bag to Townsend, and upon raiding Townsend's home, recovered a white grocery bag containing marijuana that resembled the bag he saw defendant carrying. Karssen's testimony corroborated McCloud's testimony regarding the search conducted on Townsend's home and the marijuana in the white grocery bag seized from the home. Defendant and Townsend testified that defendant did not deliver a white bag containing marijuana to Townsend. However, Townsend testified that he told police that defendant did in fact deliver two ounces of marijuana to him, just prior to the police raiding his home, because the police threatened to take his daughter away from him. Penn testified that Townsend signed a written statement, which confirmed that defendant delivered two freezer bags of marijuana to him. Therefore, the prosecution's argument that the officers were credible was based on the record, which illustrated that they had direct knowledge of the facts that they testified to, and was not improper. *Dobek*, 274 Mich App at 66; *McGhee*, 268 Mich App at 630. Furthermore, because Townsend's testimony was contrary to the police officers' testimony and contradicted his statements to police, the prosecution's arguments that Townsend was not credible and that the police officers were credible were based on the record and the prosecution's theory of the case. Therefore, these arguments did not constitute prosecutorial misconduct. *Id*.

Lastly, the prosecution argued during its closing argument that there is "testimony of the officer stating that Mr. Kimbrough's car smelled like marijuana. That you could smell the interior." McCloud testified that "[u]pon arriving at the location where we stopped him that we smelled a strong odor of marijuana emanating from the vehicle." The prosecution's argument was based on the evidence and was therefore not improper. *Dobek*, 274 Mich App at 66.

Next, defendant argues that there was insufficient evidence to support his conviction. In reviewing the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005), overruled on other grounds *People v Nyx*, 479 Mich 112 (2007); *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). This Court determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*.

Defendant was convicted of delivery of less than five kilograms of marijuana in violation of MCL 333.7401(2)(d)(*iii*). The elements of delivery under this subsection are (1) the defendant delivered a controlled substance, (2) the controlled substance was marijuana or a mixture containing marijuana, (3) the defendant knew he was delivering marijuana, and (4) the delivery consisted of less than five kilograms of marijuana. See MCL 333.7401(2)(d)(*iii*); *People v Mass*, 464 Mich 615, 638; 628 NW2d 540 (2001).

Defendant's argument that the prosecution failed to present sufficient evidence that defendant possessed the marijuana and intended to deliver the marijuana is misplaced as defendant cites the elements of possession with intent to deliver less than five kilograms of marijuana, rather than the elements of delivery of less than five kilograms of marijuana.

Defendant also asserts that the prosecution failed to present sufficient evidence of a nexus between defendant and the marijuana seized from Townsend's home. Despite the testimony of Townsend and defendant that defendant did not deliver a white bag containing marijuana to Townsend, Townsend testified that he told the police that defendant did in fact deliver two ounces, or two Ziploc bags, of marijuana to him. Townsend also signed a written statement confirming these facts. Also, McCloud testified that he saw defendant get out of a vehicle carrying a white plastic grocery bag with yellow and red writing on it. McCloud saw defendant carry the bag into Townsend's home, and according to McCloud, defendant stayed inside the home approximately five minutes. McCloud then saw defendant exit the home carrying what appeared to be a large amount of money. McCloud testified that upon raiding Townsend's home, he recovered a white grocery bag resembling the bag carried into the home by defendant and that the bag contained marijuana. Karssen's testimony corroborated McCloud's testimony regarding the search conducted on Townsend's home and the marijuana in the white grocery bag seized from the home. Viewed in the light most favorable to the prosecution, this evidence was sufficient to allow a rational jury to conclude that defendant delivered the marijuana to Townsend.

Lastly, defendant argues that the cumulative effect of the errors alleged above entitles him to relief. However, when no error occurs, "a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). As discussed above, defendant fails to establish a single error. Therefore, defendant is not entitled to relief on the basis of cumulative error.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio